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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1931.

No. 413.

THE AETNA CASUALTY AND SURETY COMPANY,
PETITIONER,

v.

PHOENIX NATIONAL BANK AND TRUST COMPANY,
RESPONDENT.

Supplemental Brief for Petitioner.

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THE AETNA CASUALTY AND SURETY COMPANY, *Petitioner*,

v.

PHOENIX NATIONAL BANK AND TRUST COMPANY, *Respondent*.

SUPPLEMENTAL BRIEF FOR PETITIONER.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OPNION BELOW.

The opinion below is found in 44 Fed. (2d) 511 (C. C. A. 6th, 1930).

JURISDICTION.

The jurisdiction of this Court rests on Section 240 Judicial Code as amended by Act of February 23, 1925, 43 Stat. 936.

STATEMENT OF FACTS.

This was an action at law brought by the respondent against this petitioner to recover the amount of $5,512.72 on a Banker's Blanket Bond, Standard Form No. 8, Bond Number 132522, issued by this petitioner to the respondent. The bond is printed in the record at pages 2 to 7.

Under the provisions of the bond the petitioner agreed to indemnify the respondent to an amount not exceeding $25,000,

against any loss sustained by the respondent which fell within the provisions of the bond. This action was brought as a result of losses alleged to have been suffered, and which it is alleged were covered by Section D of the bond which is as follows:

> "D. Any loss through the payment, whether received over the counter or through the clearing house or by mail, of forged or raised checks or (genuine) checks bearing forged endorsement or the establishment of any credit to any customer on the faith of such checks." (R. 4.)

During the life of the bond the respondent paid thirty-nine checks, all of which were deposited over a period from June 17, 1924, to August 1, 1925, which number of checks had either been raised or contained forged endorsements, or both. (R. 69 and 70.) The person who raised the checks, or forged the endorsements, either or both, was the Vice-President and Treasurer, and a member of the Board of Directors of the depositor company of the respondent, but was without authority to actually sign checks. (R. 68.)

The frauds were disclosed about August 7, 1925, or approximately fifteen months after the first check was fraudulently raised. (R. 71.)

All of the thirty-nine checks which were raised, or contained forged endorsements, were drawn by the person, who actually committed the fraud, in such way that they might easily be raised without exciting suspicion. (R. 77.)

The bank, respondent here, furnished regular monthly statements to the depositor company showing in detail all deposits made, checks paid, and charges against the depositors' account during the month, and the balances to the credit of the account at the beginning and end of each month, together with the cancelled checks which had been charged to the account during the month. (R. 77.)

The depositor's first notice of the frauds was given orally to the respondent shortly after August 7, 1925, and the first written notice was given September 25, 1925. (R. 71.) The first written notice of the frauds was given to this petitioner by letter dated October 2, 1925. (R. 71.)

Immediately after receiving notice of the alleged fraud the petitioner made an investigation and advised the bank that it was not liable on the bond, due to the negligence of the depositor and the long delay in giving notice of the frauds; that the bank should not admit liability to the depositor, make payment, or recredit the losses alleged, and that the petitioner would take the defense of any suit by the depositor and bear all expenses in connection therewith. (R. 72.) Request was also made upon the bank that a call be made upon prior endorsers for payment of the raised or forged checks. That request was not complied with.

Thereafter, and without the knowledge or consent of the petitioner, the respondent on January 14, 1926, recredited the account of the depositor with the sum of $5,512.72, the amount of the raised or forged checks. At that time, notwithstanding the request of the petitioner, the respondent had made no effort to secure a judicial determination of its liability; it had made no effort to investigate and determine whether it was liable to the depositor; nor had it made a call on any prior endorser of any one of the thirty-nine checks which had been raised or forged. (R. 76.) It had also refused to comply with the request of the petitioner not to recredit the amount, and had refused to accede to the request of the petitioner that it permit suit to be instituted by the depositor and the petitioner be allowed to defend it.

On February 3, 1926, the respondent filed its action against this petitioner for the sum of $5,512.72.

The United States District Court for the Eastern District of Kentucky in two opinions, one on the pleadings and the other on the stipulated facts, entered judgment for this petitioner. (R. 56 and 78.) On appeal the United States Circuit Court of Appeals for the Sixth Circuit reversed the judgment and afterwards denied a petition for rehearing. (R. 94, 111.)

SPECIFICATION OF THE ASSIGNED ERRORS OF THE COURT BELOW INTENDED TO BE URGED.

1. Negligence of a depositor in discovering raised or forged checks and in promptly advising the bank of such discovery relieves the bank of liability on the payment of such checks. Long delay in discovering the frauds and in advising the respondent, under the facts in this case, relieved the respondent of any legal obligation to recredit the account of the depositor with the amount paid on the raised or forged checks.

2. This was insurance *against loss* and *not against liability for loss.*

3. By voluntarily recrediting the amount of the raised or forged checks to the account of the depositor, without the knowledge and against the prior protest of the indemnitor (this petitioner) the respondent defeated any legal right it might have had to hold this petitioner liable on the bond.

4. The loss was sustained by the bank on the date that it voluntarily recredited the amount paid on the forged or raised checks to the account of the depositor, and this recredit having been made voluntarily the respondent may not hold this petitioner.

ARGUMENT.

I.

THE NEGLIGENCE OF THE DEPOSITOR RELIEVES THE BANK FROM LIABILITY FOR PAYMENT OF RAISED OR FORGED CHECKS. LONG DELAY IN THE DISCOVERY OF FRAUDS WAS NEGLIGENCE.

1. The facts disclose that the checks in the instant case were so drawn that the amounts thereof might easily be raised without exciting suspicion. They were drawn by the forger, who was Vice-President and Treasurer of the depositor company, and presented by him to the proper official of the company for signature. That officer signed the checks notwithstanding

the fact that they were so drawn that they could be easily raised in amount as, for instance, in many cases they were signed with the line for the application of the protectograph left blank. During the entire period the checks were being raised or forged (approximately fifteen months) the bank made regular monthly statements to the depositor showing all checks paid, the amounts thereof, and the balance at the beginning and end of each month, and returned the cancelled checks themselves. Nevertheless, the depositor company was so negligent that it did not discover and advise the depositee of the alleged frauds until after the perpetrator had absconded.

When a depositor demands a recredit for forged or raised checks charged to an account the bank may show that the depositor failed to give reasonable notice of the forgeries which an examination of the vouchers and statements would, or should, have revealed to the depositor. *England National Bank* v. *United States*, 282 Fed. 121 (C. C. A. 8th, 1922); *National Surety Company* v. *Stockyards National Bank*, 84 Colorado, 563; 272 Pacific, 470 (1928); *General Cigar Company* v. *First National Bank*, 290 Federal, 143 (C. C. A. 9th, 1923); *Stumpp* v. *Bank of New York*, 212 Appeals Division, 608, 209 New York Supplement, 396 (1925).

Further, in determining the sufficiency of the notice a depositor who innocently delegates the examination to a dishonest agent, is held to have such knowledge of the forgery as would have been revealed either through examination by an honest agent, or through reasonable supervision of the dishonest agent's examination. *First National Bank* v. *Farrell*, 272 Fed. 371 (C. C. A. 3d, 1921); *Fletcher American National Bank* v. *Crescent Paper Company*, 193 Indiana, 329, 139 N. E. 664 (1923); *Critten* v. *Chemical National Bank*, 171 New York, 219, 63 N. E. 969 (1902); *Leather Manufacturers National Bank* v. *Morgan*, 117 U. S. 96; *Pannonia Building & Loan Association* v. *West Side Trust Company*, 93 N. J. L. 377, 108 Atlantic, 240 (1919); 2 Morse, Banks & Banking (6th Edition, 1928) Section 472.

In *American Hominy Company* v. *Millikin National Bank*,

273 Fed. 550 (1920), the court held that a depositor was estopped by its negligence (a) in omitting to check its agent for a long lapse of time, and (b) in paying the drafts on forged endorsements.

Assuming that both the bank and the depositor company were innocent of any fraud being perpetrated, it is a fact that the person who perpetrated the fraud was a trusted officer and agent of the depositor company, and as said in *Bartlett* v. *First National Bank*, 247 Illinois, 490, 93 N. E. 337:

> "When one of two innocent parties must suffer loss by reason of the wrongful acts of a third party, the rule is almost universal that the party who has made it possible, by reason of his negligence, for the third party to commit the wrong must stand the loss."

To the same effect is *MacAndrews Company* v. *United States*, 23 Fed. (2d) 667 (1928), wherein the Court said:

> "Where, as here, a fraud has been committed by a third party, and the loss must fall on one of two innocent parties, the law lets it rest on the one whose act made possible the perpetration of the fraud."

See also *Cleve. et al.* v. *Craven Chemical Company, et al.*, 18 Fed. (2d) 711; *Atlantic Life Insurance Company* v. *Rowland, et al.*, 22 Fed. (2d) 126; *Federal Intermediate Bank of Columbia, South Carolina* v. *Mitchell*, 46 Fed. (2d) 301; *Davison* v. *Morgan, et al.*, 50 Fed. (2d) 311.

In the instant case the depositor company entrusted the person who raised the checks with the duty of keeping the books, drawing the checks, depositing them with the bank and receiving the statements and cancelled checks at the end of the month. He was the agent of the depositor, and the bank (the respondent here) recognized him as such. It is clear from the record that the fraud was perpetrated by the person who was entrusted with authority by the depositor. Further, by the negligence of the depositor that person was enabled to perpetrate the fraud. The bank was entirely innocent, and clearly a wrongful act of the agent of the depositor must be

borne by the depositor and not by the bank—especially as the record shows that the official who signed the checks for the depositor company was negligent in many respects.

2. It is the duty of a drawer to exercise due care in the preparation of checks.

In Brady on the Law of Checks, 2d Edition (1926), pp. 207–208, the rule is stated as follows:

> "Speaking of negotiable instruments generally, it has been held in many jurisdictions that, where the drawer or maker of a bill or note prepares it so carelessly that alterations may easily be made, either by insertion or erasure, without defacing the instrument or exciting the suspicion of a careful man, and the opportunity thus afforded is embraced and the instrument raised in amount, the maker or drawer will be liable upon it as raised to any holder in due course. * * *
>
> "But whatever may be the just rule in respect to promissory notes and ordinary bills of exchange, it is apparent that there is a ground on which to distinguish checks, for the relation between a bank and its depositor is essentially different from that which is found to exist between the parties to a promissory note or ordinary bill of exchange. In regard to a bill or note no one is bound, in the absence of special agreement, to purchase it or become a party to it in any manner. But a bank is bound to honor its depositor's checks at its peril. Hence it is a just rule to require the depositor to exercise reasonable care in the preparation of his checks to the end that loss may not be thrown unnecessarily upon the bank."

3. It is established law that the failure of a depositor to examine monthly statements of account and cancelled vouchers, and to notify the bank of any error therein for a long period of time, is sufficient of itself to defeat an action by him against the bank to open up and change the stated accounts. Failure of the depositor to examine the cancelled checks and the monthly statement sent by the bank within a reasonable time after receipt, and to give the bank timely notice of any errors therein, estops the depositor from questioning the correctness of the stated account. *Armour* v. *Greene County State*

Bank, 112 Fed. 631; *Hennessy Brothers & Evans Company* v. *Memphis National Bank*, 129 Fed. 557 (1904); *Stallo* v. *Wagner*, 220 Fed. 360 (1914); *General Cigar Company* v. *First National Bank of Portland*, 290 Fed. 143 (1923); *Veneri* v. *Draper*, 22 Fed. (2d) 33, (1927).

In the leading case of *Leather Manufacturers National Bank* v. *Morgan*, 117 U. S. 96, 29 L. Ed. 811 (1886), this Court, speaking through Mr. Justice Harlan, established the rule as herein stated, and that rule has never been changed. Mr. Justice Harlan, *inter alia*, said:

> "While it is true that the relation of a bank and its depositor is one simply of debtor and creditor, *Phoenix Bank* v. *Risley*, 111 U. S. 125, 127, and that the depositor is not chargeable with any payments except such as are made in conformity with his orders, it is within common knowledge that the object of a pass book (of which the modern equivalent is the monthly statement) is to inform the depositor from time to time of the condition of his account as it appears upon the books of the bank. It not only enables him to discover errors to his prejudice, but supplies evidence in his favor in the event of litigation or dispute with the bank. In this way it operates to protect him against the carelessness or fraud of the bank. The sending of his pass book to be written up and returned with the vouchers is, therefore, in effect, a demand to know what the bank claims to be the state of his account. And the return of the book, with the vouchers, is the answer to that demand, and in effect imports a request by the bank that the depositor will, in proper time, examine the account so rendered, and either sanction or repudiate it. * * * The depositor can not, therefore, without injustice to the bank omit all examination of his account, when thus rendered at his request. His failure to make it or to have it made, within a reasonable time after opportunity given for that purpose, is inconsistent with the object for which he obtains and uses a pass book. * * * Without impugning the general rule that an account rendered which has become an account stated, is open to correction for mistake or fraud, *Perkins* v. *Hart*, 11 Wheat. 256; *Wiggins* v. *Burkham*, 10 Wall. 132, other principles come into operation, where a party to a stated account, who is under a duty from the usages of business or other-

wise, to examine it within a reasonable time after having an opportunity to do so, and give timely notice of his objections thereto, neglects altogether to make such examination himself or to have it made in good faith, by another for him; by reason of which negligence the other party, relying upon the account as having been acquiesced in or approved, has failed to take steps for his protection which he could and would have taken had such notice been given. In other words, parties to a stated account may be estopped by their conduct from questioning its conclusiveness." (Parenthesis supplied.)

Further:

"We must not be understood as holding that the examination by the depositor, of his account, must be so close and thorough as to exclude the possibility of any error whatever being overlooked by him. Nor do we mean to hold that the depositor is wanting in proper care when he imposes upon some competent person the duty of making that examination and of giving timely notice, to the bank, of objections to the account. If the examination is made by such an agent or clerk in good faith and with ordinary diligence, and due notice given of any error in the account, the depositor discharges his duty to the bank. *But when, as in this case, the agent commits the forgeries which misled the bank, and injured the depositor and, therefore, has an interest in concealing the facts, the principal occupies no better position than he would have done had no one been designated by him to make the required examination; without, at least, showing that he exercised reasonable diligence in supervising the conduct of the agent while the latter was discharging the trust committed to him. In the absence of such supervision, the mere designation of an agent to discharge a duty resting primarily upon the principal, can not be deemed the equivalent of performance by the latter.*" (Italics supplied.)

Further:

"So in *Hardy* v. *Chesapeake Bank*, 51 Md. 562, which was also a case where checks forged by the confidential clerk of the depositor had been paid by the bank, and, as shown by the pass book, were charged to his account.

> The court upon an elaborate review of the authorities, said, upon the general question, that 'There is a duty owing from the customer to the bank to act with that ordinary diligence and care that prudent business men generally bestow on such cases, in the examination and comparison of the debits and credits contained in his bank or pass book, in order to detect any drrors or mistakes therein. More than this, under ordinary circumstances, could not be required.' "

The rule established in the *Leather Manufacturers* case, *supra*, has been commented upon in 2 Williston on Contracts, page 2124; 31 Yale Law Journal, 598; 24 Columbia Law Review, 469 (May, 1924).

In *Empire Trust Company* v. *Cahan*, 274 U. S. 473, 71 L. Ed. 1158 (1927), the question involved was whether the bank was liable to a depositor for the frauds perpetrated by the depositor's son who had a general power of attorney to draw checks on depositor's account with the bank. For a period of over two years the son drew checks against the father's account and applied some of the funds to his own use. The trial court and the Court of Appeals held that the bank had sufficient notice to charge it, as a matter of law, with the frauds perpetrated by the son. Mr. Justice Holmes in the opinion of this court, reversing the judgment, *inter alia*, said:

> "The person reposing confidence in the son was not the petitioner (the bank) but the respondent (the father), (National Safe Deposit Savings & Trust Company *v.* Hibbs, 229 U. S. 391, 397, 57 L. Ed. 1241, 1247, 33 Supreme Court Reporter 818), and he himself tells us that his confidence was unlimited. He put his deposits absolutely into his son's power, and the son, if he drew currency, as he might, could do with it as he saw fit. The notice to the bank was notice only of this relation of the parties. The petitioner in permitting the son to draw out the money was permitting only what it, like the respondent's bank, would have been bound to allow even if the deposit had been earmarked as a trust. * * * All that is known is that the respondent did not get the benefit of them. *But we do not place our decision upon that narrow ground.*

For in addition to what we have said, the transactions went on for over two years and the petitioner fairly might expect the respondent to find it out in a month or two if anything was wrong. Careful people generally look over their bank accounts rather frequently." (Italics supplied.)

II.

THE INDEMNITY PROVIDED BY THE BOND IS AGAINST LOSS SUSTAINED ONLY BY THE INSURED AND IT IS NOT AN INSURANCE AGAINST LIABILITY FOR LOSS.

The writing sued on in this action is an "indemnity bond." A somewhat similar bond was characterized in *Ocean Accident Etc. Corporation* v. *Old National Bank*, 4 Fed. (2d) 753 (1925). The bond in this case does not run to or for the benefit of the depositors of the bank. It runs to the bank alone, and it covers only losses sustained by the bank. Where the insurance company by its bond agreed to "indemnify the assured against loss arising or resulting from claims for damages" the Court of Appeals of Kentucky held that the insurance was against loss, not against liability for loss. *Transylvania Casualty Company, et al.* v. *Williams*, 209 Ky. 626, 273 S. W. 536 (1925).

To the same effect is *New York Indemnity Company* v. *Ewen*, 221 Ky. 114, 298 S. W. 182 (1927). The words "indemnify" and "hold harmless," as used in the writing sued upon in that case meant to make whole upon a loss actually suffered, to make good, to put back into the situation one was in before the loss. "Words and Phrases," 1st Series, p. 3539 *et seq.*, and 2 "Words and Phrases," 2d Series, p. 1032 *et seq.*, *U. S. Fidelity and Guaranty Company* v. *Williams*, 129 Atlantic (Md.) 660 (1925.)

The well recognized distinction between insurance against liability and insurance against loss or damage is recognized in *Allen* v. *Aetna Company*, 145 Fed. 881; *Schambs* v. *Fidelity & Casualty Company of New York*, 259 Fed. 55; *Thacher* v. *Aetna Company*, 287 Fed. 484.

It is submitted, therefore, that the obligation of the petitioner under its bond only arises in case the respondent sustained a loss. The petitioner maintains in this case that the respondent sustained no loss, within the terms of the bond, because it was under no legal obligation to the depositor to recredit its account with the amount of the checks. And, as was said in *Wilson* v. *Hite's Executor*, 154 Ky. 61, 157 S. W. 41 (1913):

> "Of course * * * an indemnitee should not be allowed to assert a claim against his * * * indemnitor arising on a fictitious or pretended liability, or on account of a debt that he was not legally liable for."

III.

THE BANK BY VOLUNTARILY RECREDITING THE ACCOUNT OF ITS DEPOSITOR WITH THE AMOUNTS OF THE RAISED OR FORGED CHECKS PRECLUDED ANY RIGHT IT POSSESSED TO HOLD THE INDEMNITOR.

The indemnitor is relieved from the payment of losses which could have been avoided, diminished, or recouped elsewhere by the indemnitee: *Names* v. *Dwelling House Insurance Company*, 95 Iowa, 642, 64 N. W. 628 (1895); Anson, Contracts (Corbin's Edition, 1924), Section 245; 28 Columbia Law Review, 202; *American Surety Company of New York* v. *Ballman, et al.*, 104 Fed. 634 (1900); *Thacher* v. *Aetna, etc., Company*, 287 Fed. 484 (1923).

The *American Surety Company of New York* v. *Ballman, et al.*, 104 Fed. 634 (1900), like the present case, was an action on an indemnity bond. It appeared that a suit had been brought against the indemnitee, and the indemnitors had been engaged in defending the suit, and after judgment against the indemnitee and while the indemnitors were perfecting an appeal from that judgment, the indemnitee, without the knowledge or consent of the indemnitors, paid the judgment. Thereupon

when the indemnitee brought suit against the indemnitors on the bond, the indemnitors took the position that the indemnitee's voluntary payment of the judgment had released them, the indemnitors, and in this position they were sustained by the Court.

In *Thacher* v. *Aetna, etc. Company, supra,* the indemnitor had issued a policy agreeing to indemnify the assured against damages from the operation of his automobile. The assured's daughter while driving his automobile ran over and killed a man. The administratrix of the deceased brought suit against both the assured and his daughter. The Court held the assured not liable for the tort of his daughter, and from this judgment an appeal was taken. During the pendency of the appeal the assured compromised the judgment, over the objection of the indemnitor, which maintained that the assured was not liable. The assured then sued the indemnitor on the indemnity policy. The Court held that the assured could not recover, saying:

> "It is clear that the plaintiff in error voluntarily assumed liability for the judgment against his daughter and paid the same before any liability as to him had been established in a suit instituted by his daughter against him, and that this suit is brought against defendant prior to the establishment of any claim against plaintiff, and without any refusal by defendant to defend him in a suit to establish his liability. Therefore under the contract of insurance he can not recover the amount paid by him in adjustment of his daughter's liability."

Applying that principle to this case, had the depositor sued the bank to compel the recrediting of its account with the amount of the thirty-nine checks, and had the bank then voluntarily paid its depositor over the objection of its indemnitor, even after the judgment in favor of the depositor, and pending an appeal from that judgment, such a voluntary action on the part of the bank would have released the indemnitor, this petitioner. That principle would seem to make it all the more certain that a voluntary payment by the bank to the

depositor over the objection of the indemnitor, and even before suit was instituted, would operate as a discharge of the indemnitor.

Further, the indemnitee is under legal obligation diligently to assert, or to aid the indemnitor to assert, any reasonable defense against an alleged liability. *Gorman* v. *Williams*, 117 Iowa, 560, 91 N. W. 819 (1902); *City of New York* v. *Baird*, 176 N. Y. 269 (1903); *Thacher* v. *Aetna, etc., Company*, 287 Fed. 484.

The opinion of the Circuit Court of Appeals in this case was commented upon adversely in Yale Law Journal, Volume XL, February, 1931, pages 660, 662, as follows:

> "* * * Further, under penalty of releasing the indemnitor entirely, he (the indemnitee) is required diligently to assert, or to allow and aid the indemnitor to assert, any reasonable defense to his alleged liability. In the present case there was such a reasonable defense.
>
> "* * * In the instant case the final incidence on bank or depositor of the loss that occurred on payment of the checks was dependent on subsequent events. This the court renders immaterial by its construction of the word 'loss.' The logical result of the view taken in the case would be that, even if the depositor had expressly rather than impliedly ratified the payment, indeed even if no recredit had been made, the defendant would be liable for the amount of the forged checks; no event subsequent to the payment could affect its liability. Refusing to proceed to this length, the court is in a dilemma. If it were a new question, the court's construction of the word 'loss' might perhaps find justification in the words of the policy, but the parties should be deemed to have contracted with reference to the prevailing view that 'loss' in an indemnity contract means only final, legal, actual loss to the indemnitee."

IV.

THE LOSS, IF ANY, WAS SUSTAINED BY THE BANK ON THE DATE THAT IT VOLUNTARILY RECREDITED THE AMOUNT PAID ON THE FORGED OR RAISED CHECKS TO THE ACCOUNT OF THE DEPOSITOR, AND THIS RECREDIT HAVING BEEN MADE VOLUNTARILY THE RESPONDENT MAY NOT HOLD THIS PETITIONER.

Finally, we submit that the loss, if any, was sustained by the bank on the date it recredited the account of the depositor with the amount paid on the raised or forged checks. On this proposition we respectfully quote from the opinions of the United States District Court and the United States Circuit Court of Appeals. The Trial Judge said:

"* * * The loss indemnified against by the bond was a loss 'through payment,' of such checks, i. e., the loss was a consequence of such payment. The payment was not itself a loss within the purview of the bond. The payments were on account of the Petroleum Company and plaintiff at once charged the payments to it and on its books reduced its liability to it to that extent. Its books did not show any loss. The reduction in liability to that company took the place of the cash paid out. And the plaintiff suffered no real loss unless subsequently thereto the Petroleum Company repudiated those charges. This it might or might not do. It was possible, at least, that after it became aware of the forgeries, out of consideration for the forger or for some other reason it might conclude not to repudiate the charges and to pocket the loss itself rather than let the plaintiff bear it. In such case plaintiff would suffer no loss 'through' or by reason of the payment of the checks. Further it might have no right to repudiate them. In such case it would no more suffer loss than it would where it did not in fact repudiate the payments but ratified them. This is one of the positions taken by the defendant by the allegations of its answer. It alleged that the Petroleum Company had no right to repudiate

the charges which plaintiff had made against its account of the sums paid on the forged checks and it was not liable to that Company for so much of its account as had been reduced by such payments because of its negligence in three particulars, to-wit; in the drawing of the checks, in not discovering the forgeries as soon as it reasonably could after the return of the monthly statements, and in not promptly notifying defendant (plaintiff) of the forgeries after it had discovered them.

"* * * If then the allegations of the answer as to the negligences of the Petroleum Company are true the plaintiff suffered no loss by reason of the payments in question and is not entitled to recover from defendant." (R. 59 and 60.)

The opinion of the United States Circuit Court of Appeals held:

"The primary question is, when was the loss suffered? We conclude that the moment the bank paid the check over the counter or through the clearing house, its loss was complete. The relation between banker and depositor is that of debtor and creditor; the money with which the check is paid is the money of the bank; its contract with the depositor only entitles it to charge back to, and collect from, the depositor the amount of a valid check so paid. When it pays a forged check, it has no right to make this counter charge, and its loss continues to be its loss. True, the continuance is attended by a contingency,—the depositor may ratify the forgery. Such a ratification may be intentional and express, or may be implied as the result of circumstances which estop the depositor from disputing the check. So, in the present case, the loss was suffered and the liability arose from time to time as the checks were paid; and, when finally, the bank cancelled the charges and recredited the total, it was not then suffering a loss; it was abandoning a claim for recoupment of its earlier loss,—a claim which at first it did not have. We think therefore, that the policy should be read as indemnity against the original loss, and not as holding the liability in the air until it can finally be determined whether the bank had a right to make the charge back. It is not reasonable to suppose that the bank intended to buy that kind of indemnity. Banks wish to keep their depositors,

not to alienate them. They would desire protection against the payments induced by forgery, not against the uncollectability of claims resulting from such payment." (R. 96.)

The expressions of the two lower courts are all we can presently find bearing directly on the subject. The reasoning of the trial court appears to us to be the more sound and logical. The bond by its terms was *an indemnity against loss* and *not against liability for loss*. The loss having been sustained on the date of recredit, there being no obligation on the part of the bank to make a recredit, the recredit having been made voluntarily, over the prior protest and without the knowledge and consent of the indemnitor, it is respectfully submitted that no liability attaches under the bond.

We further urge that, even if the loss was complete the moment the bank paid the check, as held by the Circuit Court of Appeals, nevertheless, when the bank charged the amount of the checks against the depositor and the depositor ratified the charge, either expressly or impliedly, the bank's original loss no longer existed. That is to say, if the depositor was negligent in the drawing of its checks, or took an unreasonably long time to discover the fraud, there would be such a ratification of the charge against its account the bank would be relieved from liability and the bank would, therefore, sustain no loss, and the petitioner would not be liable.

We venture to suggest, if we may, that Indemnity Insurance Companies would not write an indemnity bond which would carry with it a guarantee of indemnity immediately upon the payment by the indemnitee of raised or forged checks, if it did not have the right to assert and rely upon the long established practice of determining whether the indemnitee had a defense to the claim of the party who asserted the loss. The judgment of the Circut Court of Appeals not only denies, and completely ignores this well recognized right, but at the same time relieves the depositor from all negligence, however gross. It is not only the right but the duty of the insurance company to pay losses only after they are determined, upon investigation,

to be legal and actual. Any rule other than that for which we are here contending, we respectfully submit, would subject the bank, and the indemnitor, to unlimited frauds and would deny to each the long established right and duty to assert all proper legal defenses against claims for losses.

Respectfully submitted,

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